

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SCOTT AVERY

Claimant

VS.

COLLINS INDUSTRIES

Respondent

Self-Insured

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Docket No. 261,626

ORDER

Respondent appealed Administrative Law Judge Bruce E. Moore's August 2, 2001, Order. The Appeals Board heard oral argument on February 13, 2002.

APPEARANCES

Claimant appeared by his attorney, Matthew L. Bretz of Hutchinson, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Scott J. Mann of Hutchinson, Kansas.

RECORD

The record considered by the Appeals Board (Board) includes the March 15, 2001, Preliminary Hearing transcript; the August 2, 2001, Motion on Penalties transcript and exhibits admitted at those hearings.

ISSUES

The Administrative Law Judge (ALJ) assessed a penalty against the respondent of \$100 per week from May 1, 2001, and continuing until respondent has authorized in writing for D. Troy Trimble, D.O. to proceed with surgery necessary to relieve and cure the effects of claimant's work-related low back injury.

Respondent appeals and contends that the ALJ exceeded his authority in assessing penalties against respondent for refusing to pay for surgery recommended by claimant's court-ordered authorized treating physician. The respondent requests the Board to reverse the ALJ's Order and deny claimant's request for penalties.

Conversely, claimant requests the Board to affirm the ALJ's Order assessing penalties against respondent. The claimant contends that K.S.A. 44-512a entitles claimant to penalties because respondent failed to pay for medical compensation in the form of surgery as recommended by claimant's authorized treating physician.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments contained in the claimant's brief, the Board makes the following findings and conclusions:

The Board has jurisdiction to review an order for the assessment of penalties under K.S.A. 44-512a because it is a final order.¹

After claimant's October 26, 2000, work-related accident, respondent voluntarily provided medical treatment first through company physician Larry Ensz, D.O. Dr. Ensz then referred claimant to Dr. Trimble. Dr. Trimble first saw claimant on November 16, 2000. He diagnosed claimant with L4-5 and L5-S1 degenerative disc disease and herniated discs at L3-4 and L4-5. The doctor took claimant off work and he recommended surgical intervention of decompression laminectomies at L3 and L4. But respondent refused to authorize the surgery.

Because respondent refused to voluntarily provide claimant with medical treatment, claimant filed a demand for respondent to furnish medical treatment and a request for a preliminary hearing. As the result of a March 15, 2001, preliminary hearing, the ALJ found claimant proved he suffered a low back injury while working for respondent on October 26, 2000. In a March 15, 2001, preliminary hearing Order, the ALJ ordered respondent to provide claimant with the names of three qualified physicians for claimant to choose an authorized treating physician. Temporary total disability compensation was also ordered paid from January 12, 2001. From these three physicians, Dr. Trimble, of Wichita, Kansas, which had previously treated claimant, was chosen as claimant's authorized treating physician.

Dr. Trimble then scheduled surgery for May 1, 2001. On April 30, 2001, the afternoon before the surgery, respondent informed Dr. Trimble that it would not pay for the surgery. Dr. Trimble cancelled the surgery.

Claimant's attorney sent a Demand for Compensation pursuant to K.S.A. 44-512a to respondent, respondent's third party administrator, and respondent's attorney, demanding that respondent authorize payment for the surgery recommended by claimant's authorized treating physician Dr. Trimble or claimant would seek appropriate statutory penalties. At the August 2, 2001, Motion on Penalties hearing, respondent's attorney

¹ See Waln v. Clarkson Constr. Co., 18 Kan. App. 2d 729, 731, 861 P.2d 1355 (1993).

admitted that Dr. Trimble was claimant's court-ordered authorized treating physician and his surgery recommendation should have been authorized by respondent.²

But respondent's attorney also argued that the penalty statute, K.S.A. 44-512a, does not provide for the assessment of penalties against respondent when authorized medical treatment has not yet been provided. Respondent argued that K.S.A. 44-512a provides for assessment of penalties against the employer or its insurance company for failure to pay any past due compensation, including medical compensation, which has been awarded. In this case, however, there are no outstanding medical expenses or temporary total compensation payments that are past due and not paid. Therefore, respondent argues that its refusal to pay for claimant's surgery is not subject to penalties because the payment of medical compensation has not accrued and there are no medical bills past due. Moreover, as the respondent points out, the remedy provided by the legislature for respondent's failure to provide court-ordered medical treatment is contained in the Fraud and Abuse statute found at K.S.A. 44-5,120 et seq.

Claimant, however, argues that the ALJ did not err when he assessed penalties against respondent for refusing to pay for the court-ordered medical treatment. Claimant contends that K.S.A. 44-512a entitles an injured employee to civil penalties to be assessed against the employer, in the event any compensation, including medical compensation, is awarded and is not paid when due. Thus, claimant argues respondent's notification to Dr. Trimble that it would not pay for the scheduled surgery was a refusal to pay medical compensation and is subject to penalties under K.S.A. 44-512a.

The Board recognizes the ALJ's frustration from respondent's refusal to comply with his March 15, 2001, preliminary hearing Order and pay for the surgery recommended by the court-ordered authorized treating physician.³ Although the Board also shares in the ALJ's frustration and is appalled by the respondent's action, the Board finds the penalty statute only provides for a civil penalty to be assessed against the respondent in regard to medical compensation previously provided as evidenced by medical bills that are past due and not paid by the respondent. The penalty statute does not provide for a penalty to be assessed against the respondent for refusal to pay for authorized medical treatment not yet provided. The Board, therefore, reverses the ALJ's August 12, 2001, Order that assessed a penalty against respondent and finds that claimant's request for penalties under K.S.A. 44-512a should be denied.

² Motion on Penalties transcript, August 2, 2001, pp. 6-7.

³ Motion on Penalties transcript, August 2, 2001, pp. 9-11.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Bruce D. Moore's August 2, 2001, Order that assessed penalties against the respondent should be reversed, and claimant's request for penalties is denied.

IT IS SO ORDERED.

Dated this ____ day of May 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
Scott J. Mann, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Workers Compensation Director